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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re R.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. R.S., Defendant and Appellant.	A154336 (Solano County Super. Ct. No. J43803)

R.S. (Minor) appeals a dispositional order placing him in a juvenile hall program and imposing conditions of probation. He contends that the juvenile court improperly delegated its authority to determine the length of his confinement, and that probation conditions requiring him to attend counseling and prohibiting him from being present in a building that he knows contains firearms or weapons are invalid. We shall modify the weapons condition and otherwise affirm the order.

I. BACKGROUND

An amended juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)), filed April 2, 2018, alleged Minor committed battery on school, park, or hospital property (Pen. Code, § 243.2, subd. (a); count 1), attempted robbery (Pen. Code, §§ 664 & 211; counts 2 & 4), second degree robbery (Pen. Code, § 211; count 3), and resisting a peace officer (Pen. Code, § 148, subd. (a)(1); count 5). The district attorney later added a sixth

count, accessory after the fact. (Pen. Code, § 32; count six.) Defendant admitted to count six, and the remaining counts were dismissed. The probation officer's report indicated defendant assisted and participated in an armed robbery of two people seated in a car.

On May 10, 2018, the juvenile court continued Minor as a ward of the court, committed him to the custody of the probation officer for placement in Challenge Academy at the juvenile hall, and provided that he not leave his placement until approved by the probation officer or the court. The court calculated Minor's maximum confinement as three years and ten months. Among his conditions of probation, Minor was ordered to attend counseling of a type determined by his probation officer. He was also ordered not to be present in buildings or vehicles that he knows contain firearms, ammunition, or dangerous weapons.

II. DISCUSSION

A. Delegation of Authority Over Length of Commitment

Minor makes three challenges to the dispositional order. First, he contends the juvenile court improperly delegated to the probation officer authority to determine the length of his commitment. This delegation, he asserts, violates the doctrine of separation of powers and deprives him of his right to due process because he is subject to incarceration without a hearing before a judicial officer.

"It is well settled that courts may not delegate the exercise of their discretion to probation officers." (*In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1372.) Thus, a probation officer may not add new conditions of probation, such as a curfew or a directive to stay out of gang territory. (*Ibid*.) However, a court may properly "dictate the basic policy of a condition of probation, leaving specification of details to the probation officer." (*In re Victor L.* (2010) 182 Cal.App.4th 902, 919.) The rule of separation of powers has been interpreted to allow delegation of authority " 'so long as (1) the exercise thereof is incidental or subsidiary to a function or power otherwise properly exercised by such department or agency, and (2) the department to which the function so exercised is primary retains some sort of ultimate control over its exercise, as by court review in the

case of the exercise of a power judicial in nature.' " (*In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1236.)

In the recent case of *In re J.C.* (2019) 2019 Cal.App. LEXIS 279, our colleagues in Division Five of this district considered a claim similar to that before us now. A juvenile court ordered a minor to participate in the county's Youth Offender Treatment Program (YOTP) and successfully complete all phases of the program. The program would last ten months if a minor progresses on schedule, but in practice different people progress at different paces. (*Id.* at pp. *2–*4.) The juvenile court set a " 'YOTP review date' " for seven months after the disposition order. (*Id.* at p. *4.) On appeal, the minor contended the disposition order impermissibly delegated to the probation officer the authority to determine the length of his commitment, because the probation officer would determine whether and when he successfully completed YOTP, which in turn would determine when he would be released. (*Id.* at p. *4.) Our colleagues rejected this argument. They relied on *In re Robert M.* (2013) 215 Cal.App.4th 1178, 1182, which considered a challenge to an order that required a minor to complete sex offender counseling at the Division of Juvenile Facilities (DJF), then return to the juvenile court for possible modification of his sentence. (*In re J.C.*, at pp. *6–*7.) The court in *In re Robert M.* concluded the order did not impermissibly intermingle the responsibilities of the probation department and the DJF because the juvenile court retained supervision and control over the minor. (*In re Robert M.*, at p. 1185.) Similarly, in *In re J.C.*, the juvenile court "retain[ed] the ultimate authority to determine whether and when Minor successfully complete[d] [the treatment program]." (*In re J.C.*, at p. *5.) In fact, as our colleagues noted, the juvenile court had scheduled a " 'YOTP review date' " seven months after disposition, and would presumably schedule "further hearings necessary to the exercise of its retained authority over whether and when Minor successfully completes YOTP." (*Id.* at pp. *7–*8.) This scheduled review hearing "further undermines" the argument that the court delegated to the probation officer authority to decide whether the minor had successfully completed the program. (*Ibid.*)

We reach the same conclusion here. The juvenile court set Minor's maximum term of confinement and ordered that Minor remain in the Challenge Academy until approved by the probation officer *or the court*, thus retaining authority to determine the length of the confinement. It set a review hearing within six months. (See *In re J.C.*, *supra,* 2019 Cal.App. LEXIS 279 at pp. *7–*8.) The juvenile court did not impermissibly delegate its authority to the probation officer or deprive Minor of his right to due process.

B. Counseling

Defendant's second challenge is to the probation condition requiring him to attend counseling of a type determined by the probation officer. He argues this condition constitutes an invalid delegation of judicial authority and is unconstitutionally vague. We reject these contentions.

The defendant in *People v. Penoli* (1996) 46 Cal.App.4th 298, 307–310 (*Penoli*), made a similar challenge to a condition granting the probation department authority to select a residential drug treatment program and determine whether she had successfully completed the program. The appellate court found the condition permissible, noting that "any attempt to specify a particular program at or prior to sentencing would pose serious practical difficulties. The trial court is poorly equipped to micromanage selection of a program, both because it lacks the ability to remain apprised of currently available programs and, more fundamentally, because entry into a particular program may depend on mercurial questions of timing and availability." (*Id.* at p. 308.)

Minor seeks to distinguish *Penoli* on the ground that the order there identified the *type* of program, i.e., drug treatment, and the order here gives the probation officer discretion to order him to participate in a range of possible types of counseling programs. We are not persuaded this distinction requires a different result. At the dispositional hearing, Minor's probation officer testified that Challenge Academy offered various services that would rehabilitate him: "intensive anger management counseling, conflict resolution counseling, critical thinking skills, [and] life skills." Minor was placed in the Challenge Academy, and the juvenile court could reasonably delegate to the probation

officer responsibility for selecting, from the counseling programs offered there to benefit juvenile offenders, those in which Minor must participate. If the probation officer later seeks to have Minor take part in counseling programs that he believes are inappropriate, he may seek to have the order changed either in a future review hearing or by filing a petition to modify the dispositional order. (Welf. & Inst. Code, § 778, subd. (a); see *Penoli*, *supra*, 46 Cal.App.4th at p. 308; *In re J.C.*, *supra*, 2019 Cal.App. LEXIS 279 at p. *12)

Minor also contends the counseling condition is unconstitutionally vague. "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of void for vagueness." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) A probation condition informing Minor that he must participate in counseling ordered by his probation officer leaves neither him nor the court unable to determine if it has been violated. Minor's vagueness challenge fails.

C. Firearm Condition

Among the gang-related terms and conditions of probation was the following: "*The Minor shall not be present in any building or vehicle that he/she knows contains a firearm, ammunition, or other dangerous or deadly weapons*. Nor shall the Minor be in the presence of any person or persons whom the Minor knows illegally possesses a firearm, ammunition, or other dangerous or deadly weapons, or who the Minor knows are gang members and possess a firearm, ammunition, or other deadly or dangerous weapons." (Italics added.) Defendant contends this condition is overbroad because the italicized portion prohibits him from entering any establishment with an armed guard, including courthouses, police stations, and even juvenile hall. He also argues it impermissibly restricts him from entering a home containing cutlery or the homes of friends or family members who own weapons legally, even if those weapons are safely locked away.

We agree with Minor that the condition must be modified. "[A] probation condition is unconstitutionally overbroad if it imposes limitations on the probationer's

constitutional rights and it is not closely or narrowly tailored and reasonably related to the compelling state interest in reformation and rehabilitation." (*People v. Forrest* (2015) 237 Cal.App.4th 1074, 1080 (*Forrest*).) The court in *Forrest* considered an overbreadth challenge to a condition prohibiting the defendant from "remain[ing] in any building, vehicle, or in the presence of any person where you know a firearm, deadly weapon, or ammunition exists." (*Id*. at p. 1083.) The court concluded the condition must be modified to pass constitutional muster: "Given the widespread presence of armed security personnel in buildings and other locales, we conclude [the] condition . . . is unconstitutionally overbroad because it unduly restricts Forrest's constitutionally guaranteed freedom of travel and association and her right to access the courts, and because it is not narrowly tailored to safeguard these fundamental rights while restricting her conduct in a manner reasonably designed to promote her rehabilitation and to protect public safety." (*Id.* at p. 1084.) The court modified the condition to provide: " 'Do not remain in the presence of any person who you know illegally possesses a firearm, deadly weapon, or ammunition. Also, do not remain in a building, in a vehicle, or in the presence of any person when you knowingly have ready access to a firearm, regardless of whether it is lawfully possessed or was lawfully acquired.' " (*Id*. at p. 1085.) This modification, the court concluded, would "remedy the unconstitutional overbreadth of [the] probation condition . . . while safeguarding the state's interest in maintaining public safety, preventing future criminality, and rehabilitating Forrest by deterring her from knowingly having ready access to firearms." (*Ibid*.)

A similar modification is appropriate here. Minor asks us to modify the condition to prohibit him from being in buildings or vehicles, or in the presence of people, that he knows contain or possess *illegal* firearms, ammunition, or weapons. While this would cure the overbreadth problem, it would not fully address the issue of Minor's association with people who use weapons to commit crimes—weapons they might possess legally. Instead, we shall order the condition modified as follows: "The Minor shall not be present in any building or vehicle in which he knowingly has ready access to a firearm, ammunition, or other dangerous or deadly weapon, whether it is lawfully possessed or

was unlawfully acquired. Nor shall the Minor be in the presence of any person or persons who the Minor knows illegally possess a firearm, ammunition, or other dangerous or deadly weapons, or who the Minor knows are gang members and possess a firearm, ammunition, or other dangerous or deadly weapons."

Minor argues that even this condition is overbroad because it would prohibit him from being in a home that contains ordinary cutlery, such as a steak knife, which can be used as a weapon. Not so. "When interpreting a probation condition, we rely on 'context and common sense' [citation] and give the condition ' "the meaning that would appear to a reasonable, objective reader." ' " (*In re I.S.* (2016) 6 Cal.App.5th 517, 525, disapproved on another ground in *People v. Adelman* (2018) 4 Cal.5th 1071, 1078, fn. 10.) As explained in *In re R.P.* (2009) 176 Cal.App.4th 562, 570, the only reasonable reading of a probation condition prohibiting possession of any " 'dangerous or deadly weapon' " is that the probationer is prohibited from "possessing any item specifically designed as a weapon" and from possessing any item not specifically designed as a weapon "if he intends to use the item to inflict or threaten to inflict death or great bodily injury." Kitchen utensils kept for their ordinary use in cooking or eating do not fall within the scope of the challenged condition.

III. DISPOSITION

Probation condition 21-3 is modified to read: "The Minor shall not be present in any building or vehicle in which he knowingly has ready access to a firearm, ammunition, or other dangerous or deadly weapon, whether it is lawfully possessed or was unlawfully acquired. Nor shall the Minor be in the presence of any person or persons who the Minor knows illegally possess a firearm, ammunition, or other dangerous or deadly weapons, or who the Minor knows are gang members and possess a firearm, ammunition, or other dangerous or deadly weapons." As so modified, the May 10, 2018 dispositional order is affirmed.

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TUCHER, J.

WE CONCUR:

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STREETER, Acting P. J.

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BROWN, J.